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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000550-MR

DENISE ELLEN LEHR (BLANSETT) APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 17-CI-001010

FRANK HACK, EXECUTOR FOR THE
ESTATE OF WILLIAM D. HACK, JR. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Denise Ellen Lehr (Blansett), *pro se*, filed a will contest action against Frank Hack, Executor for the Estate of William D. Hack, Jr. (the Estate), claiming that William lacked the capacity to make a will or his will was the product of undue influence and she should inherit under Kentucky's intestacy laws as she was William's natural daughter. The Jefferson Circuit Court

granted summary judgment to the Estate and dismissed Denise's will contest action.

In 1946, James Blansett married Doris Spadie and three daughters were born during their marriage: Linda, Cheryl, and Denise. Denise, the youngest, was born in 1959. Denise claims her mother Doris was having a longstanding affair with William and that although James was her legal father, William was her biological father.

James and Doris divorced in 1976. As part of the decree of dissolution, Doris retained the marital residence on Frieden Way. Shortly thereafter, William married Doris and became Denise's step-father. Construing the facts most favorably to Denise, Denise had a good relationship with William both before and after he married Doris, with him acting in a parental role towards her.

However, there was a falling out between Doris's daughters and William after Doris died in 1991 without a will. The daughters believed they should have received complete ownership of the Frieden Way residence and other property in accordance with their mother's expressed wishes. The daughters jointly requested William to vacate the residence and deed it to them, as they wished to return it to their father James, who built the residence. A settlement was reached in which William received payment for his surviving spouse interest. After this dispute, any ongoing relationship that William had with Denise ended.

While James and Doris were living, Denise consistently acknowledged that James was her father. Neither William nor Doris ever told Denise that William was her father. Denise only claimed William was her father after both her parents died and, after William died, when she challenged his will.

William executed a will in 2007. In the 2007 will, William designated that his property be placed in an *inter vivos* trust, with trustees to serve in the following order: Frank (his brother), Sandra Beiling Hack (his sister-in-law), and Amy Petry Denes (his niece, Frank's daughter).

William executed a second will in 2014. In the 2014 will, William left his property to his brother Frank and contingently to Sandra and, thereafter, to the children of his brother Frank. William specifically stated in this will, "I do not have a wife, any sons, or any daughters. The daughters of my deceased wife, Doris Hack, are Denise Lehr, Cheryl Aubrey, and Linda Benjamin." Thereafter, William stated twice, first in the section relating to bequests, personal property, and real property and second in the section relating to his residuary estate, "I intentionally make no bequest to Denise Lehr, Cheryl Aubrey, and Linda Benjamin." Although the will speaks of "children," it is clear this was a reference to Frank's children, should Frank and his wife predecease William.[1]

[1] Additionally, "[i]n Kentucky as in other states, the testator's use of the word *children* is ordinarily construed to mean legitimate children to the exclusion of illegitimate children." *Carey v. Jaynes*, 265 S.W.3d 801, 804 (Ky.App. 2008).

William died in February 2015. In 2017, Denise, *pro se*, filed a complaint contesting William's will alleging she was William's daughter and had a right to his estate. She alleged when William died he did not have the mental capacity to make a will and was unduly influenced by his brother Frank. Denise also requested the return of any photos and family heirlooms belonging to her mother, Doris, which William had in his possession at the time of his death and access to William's medical records.

Denise's proof that William was her biological father consisted of the following: (1) a DNA test comparing Denise's blood with that of her older sister Linda's blood, which stated that the probability of them being full siblings was 18.6% and the likelihood of them not having the same father was four to one;[2] (2) an affidavit from Linda in which she detailed: (a) her personal observations that made her believe that William and Doris were having a longstanding affair; (b) the physical similarities that William and Denise shared; and (c) her report of a double hearsay conversation in which her deceased aunt revealed that Doris admitted to the aunt that William was Denise's father; (3) Doris's failure to deny that William was Denise's father when Denise asked her; (4) photographs purporting to show a

[2] Denise assumes this shows that James is not her biological father, but such a test result could instead indicate that James is not Linda's biological father. Denise's sister Cheryl was deceased by this time, which is the reason her blood was not tested.

similarity between Denise and William; and (5) Denise's personal belief that William was her biological father.

Denise requested DNA from Frank so that testing could be conducted to try to establish that William was her biological father.[3] Her request was denied. Denise filed an appeal to this Court, which was dismissed as she appealed from a non-final order.

The Estate filed a motion for summary judgment arguing Denise could not show that William lacked the testamentary capacity to make a will or that William's 2014 will was the product of undue influence. The Estate also argued Denise could not prove that William was her natural father. Denise opposed the motion on the basis that: (1) the second section of the 2014 will relating to William's residuary estate which stated, "I intentionally make no bequest to Denise Lehr, Cheryl Aubrey, and Linda Benjamin," which was numbered as 3.6 instead of 4.5, was an obvious mistake; (2) the Estate admitted that William was in assisted living beginning in 2012 and had cancer and a minor stroke and this established he was not in an "independent state" when the 2014 will

[3] While a blood test comparing Frank's blood to Denise's might show that they are related, it could not definitively prove that William is Denise's biological father. While definitive results could be obtained by exhuming and testing William's body, assuming his remains were buried rather than cremated, Denise never made a request for exhumation. *See, e.g.*, *Croucher v. Clark*, No. 2005-CA-000736-MR, 2006 WL 1867909, *2 (Ky.App. July 7, 2006) (unpublished) (discussing establishment of paternity through DNA testing after exhumation). We take no position on whether such a hypothetical request would be appropriate under these circumstances.

was executed; (3) William's signature on the 2014 will seemed to "waiver" in appearance compared with his previous signatures; (4) the claim in William's 2014 will that he had no biological children was incorrect; (5) the fact that James was Denise's legal father was irrelevant; (6) under the terms of the will Denise can inherit as William's child; and (7) Denise provided proof that William was her biological father and acted in a parental role towards her and the Estate did not disprove that William was her biological father.

On March 22, 2018, the circuit court granted summary judgment to the Estate on the basis that there was no genuine issue of material fact presented as to William's mental capacity to execute a will or any undue influence exerted on William to make the 2014 will invalid and dismissed Denise's complaint with prejudice. The circuit court ruled that the 2014 will was properly admitted to probate as it was a valid will with a clear expression of William's testamentary intent. The circuit court awarded costs and attorney's fees to the Estate and added language of finality.

Denise reiterates the arguments she made in opposing summary judgment and emphasizes that she is not seeking to inherit as William's step-daughter but as his biological daughter and that the language excluding her from inheriting which identifies her as the daughter of his deceased wife does not

exclude her from inheriting as his biological daughter.[4] She states that William was a detail-oriented person and would catch the numbering mistake in his 2014 will if he was at normal mental capacity and, because he was in assisted living, had cancer, and had a stroke, she "feels" he was not in a lucid moment when making his will.

Regarding the evidence that she lacks, Denise argues she would have further proof of William's incapacity had his medical records been produced as she requested, and she should be entitled to DNA test Frank's blood to compare it to markers in her own blood and establish that she is William's biological daughter.

[4] Although Denise asserts that James's being her legal father is not inconsistent with William's being her biological father and having the right to inherit from William as his daughter, Denise has no right to receive the benefits associated with having two fathers and a mother. *See Michael H. v. Gerald D.*, 491 U.S. 110, 130-31, 109 S.Ct. 2333, 2346, 105 L.Ed.2d 91 (1989) (rejecting the arguments that there is a due process, liberty, or equal protection right for a child to retain a filial relationship with both her legal father and her biological father). Kentucky adheres to the "presumption of legitimacy," embodied in Kentucky Revised Statutes (KRS) 406.011, which assumes that a child born during lawful wedlock is the product of the husband and the wife. *S.R.D. v. T.L.B.*, 174 S.W.3d 502, 506 (Ky.App. 2005). Pursuant to KRS 406.011, Denise is presumed to be the daughter of her legal father, James, because her parents, James and Doris, were married when she was born, and she has presented no evidence that the marital relationship between her parents ceased before her birth. With such a presumption, Denise received the right to inherit from James if he died intestate or if he devised property to his "children" without the necessity of being specifically named. Although the presumption of paternity and legitimacy contained in KRS 406.011 is not conclusive, it "is one of the strongest known to law" and can only be overcome by evidence which is "so clear, distinct and convincing as to remove the question from the realm of reasonable doubt." *S.R.D.*, 174 S.W.3d at 506 (quoting *Bartlett v. Commonwealth ex rel. Calloway*, 705 S.W.2d 470, 472 (Ky. 1986)). Therefore, it appears that to be eligible to inherit under the intestacy laws from William, Denise would first have to establish James was not her father and essentially delegitimize herself.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

For Denise to survive summary judgment, she had to establish that there were genuine issues of material fact as to the validity of both of William's wills and there was a genuine issue of fact as to whether she could establish she is William's daughter to be eligible to inherit from William through Kentucky's intestacy laws.[5] We affirm as Denise failed to show there were genuine issues of material fact as to whether William's wills were invalid because he lacked capacity or undue influence destroyed William's free agency in making his wills.

[5] Illegitimate children have a constitutional right to inherit from their fathers. *Ellis v. Ellis*, 752 S.W.2d 781, 783 (Ky. 1988). An illegitimate child can inherit from her father through intestacy laws even when paternity is not established prior to the putative father's death. *Wood v. Wingfield*, 816 S.W.2d 899, 905 (Ky. 1991). However, Denise would have to establish by clear and convincing evidence that William is her father. KRS 391.105(1)(b)(2). If Denise could prove she is William's daughter, she would then have priority over William's brother Frank in inheriting from William under Kentucky's intestacy laws. KRS 391.010(1), (3).

"Kentucky is committed to the doctrine of testatorial absolutism." *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998) (quoting J. Merritt, 1 Ky.Prac.—Probate Practice & Procedure, § 367 (Merritt 2d ed. West 1984)). "The practical effect of this doctrine is that the privilege of the citizens of the Commonwealth to draft wills to dispose of their property is zealously guarded by the courts and will not be disturbed based on remote or speculative evidence." *Id.* As set out in KRS 394.020: "Any person of sound mind and eighteen (18) years of age or over may by will dispose of any estate, right, or interest in real or personal estate that he may be entitled to at his death, which would otherwise descend to his heirs[.]"

"To validly execute a will, a testator must: (1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose." *Bye*, 975 S.W.2d at 455. To invalidate a will, either for lack of testamentary capacity or for undue influence, the contestant bears the burden of demonstrating the lack of capacity or the existence and effect of undue influence. *Id.* at 456-57.

"The degree of mental capacity required to make a will is minimal." *Id.* at 455. "Merely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in

conversation does not render one incapable of validly executing a will." *Id.* at 456. While a ruling of total disability is evidence of lack of capacity, it is not dispositive. *Id.* If the testator is suffering from a mental illness the effect of which is variable over time, it is presumed the will was executed during a lucid interval. *Id.*

Undue influence can only be established if the influence is of such an extent that it destroys "the testator's free agency" and, thus, is not the sort of influence exerted "merely from acts of kindness, appeals to feeling, or arguments addressed to the understanding." *Fischer v. Heckerman*, 772 S.W.2d 642, 645 (Ky.App. 1989).

> To determine whether a will reflects the wishes of the testator, the court must examine the indicia or badges of undue influence. Such badges include a physically weak and mentally impaired testator, a will which is unnatural in its provisions, a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, participation by the principal beneficiary in the preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs.

Bye, 975 S.W.2d at 457.

Denise failed to present any material issues of fact as to whether William lacked capacity to make a will or that his will was the product of undue

influence. There was absolutely no evidence that William's medical issues deprived him of the capacity to make a will. William's 2014 will was cogent, logical, and consistent with his earlier 2007 will and does not bear any badges of undue influence. William left his estate to his brother with whom he had a longstanding relationship instead of to Denise, from whom he was estranged.

At the heart of Denise's argument seems to be an implication that if William knew he was her father and was competent and not unduly influenced, he would have left his estate to her. Therefore, his failure to do so shows that he was incompetent and unduly influenced. However, such an argument is patently illogical.

If William and Doris did have a longstanding affair, William would have a basis for concluding that he could be Denise's biological father. However, even if William knew he was Denise's biological father, this did not obligate William to leave Denise anything. In the power to make a will is the power to gift assets to anyone the testator wishes, whether it seems fair or not.

A testator's knowing the natural objects of the testator's bounty and obligations to them does not mean that the testator must make a will favoring the natural objects of the testator's bounty. "It is a cardinal principle in the law of wills that the testator, if of sound mind and not under undue influence, has a right to dispose of his property as he pleases; and, if he pleases to dispose of it contrary

to the dictates of natural or moral obligation, he has a perfect right to do so[.]" *Hoerth v. Zable*, 92 Ky. 202, 17 S.W. 360, 361 (1891).

> A testator has a legal right to dispose of his estate as he may wish, even to discard the natural objects of his bounty, and give his estate to a stranger, without assigning or having any good reason for so doing whatever. This is his perfect right of alienation. And to say that the fact that he disposed of it out of the natural or usual course, thereby exercising his perfect right, was of itself evidence of a want of a disposing mind or of undue influence, would virtually defeat this right. It is therefore taken alone incompetent evidence of incapacity or undue influence.

Bottom v. Bottom, 106 S.W. 216, 218 (Ky. 1907) (quoting *Zimlich v. Zimlich*, 90 Ky. 657, 14 S.W. 837, 838 (1890)).

"[M]erely because one happens to be the offspring of a testator does not *entitle* one to be included in an estate." *Wallace v. Scott*, 844 S.W.2d 439, 441 (Ky.App. 1992). A choice to disinherit a child, whether just or unjust, does not mean that the testator lacks the capacity to make a will. *Gerard v. Gerard*, 350 S.W.2d 719, 722 (Ky. 1961); *Hoerth*, 17 S.W. at 361; *Wallace*, 844 S.W.2d at 441.

This is particularly evident if there is a known reason for the testator's action of disinheriting the natural objects of the testator's bounty. For example, in *Bickel v. Louisville Tr. Co.*, 303 Ky. 356, 363-64, 197 S.W.2d 444, 448 (1946) (quoting *Dossenbach v. Reidhar's Ex'x*, 245 Ky. 449, 53 S.W.2d 731, 738 (1932)),

the Court opined there was no lack of capacity shown from the testator's devising most of his estate away from his closest relative where the testator "manifested no . . . (unexplained) prejudice against any of his relatives[.]" The lack of a substantial gift being left to the testator's niece was explained by her testimony about their estrangement which resulted from her telling her uncle not to visit her home if he was going to ask her husband for money. *Id.* at 361, 364, 197 S.W.2d at 447, 449.

There is no indication that even if Denise was William's biological daughter and he knew she was, he ever had a plan to leave any of his estate to her. Indeed, his action in identifying his step-daughters by name in his will and specifically disinheriting them was logical given his likely perception that they had taken sides against him and in favor of their father James in the dispute over the Frieden Way property.

Just because Denise may be William's biological daughter does not mean that he was obligated to treat her any differently than his other step-daughters. If he believed he was her biological father, it might be even more disheartening for William to think Denise picked her legal father over him in such a dispute.

Additionally, there is no indication that Denise had any positive interactions with William for more than twenty years, the interval between Doris's

death and William's death. This continued estrangement provided a sufficient explanation for why William chose to leave his estate to his brother instead of Denise in the wills written more than sixteen and twenty-three years after their estrangement began. *See Hoerth*, 17 S.W. at 361 (upholding will where "the testator virtually disinherited his four children, because they took sides with their mother, and became estranged from the testator in the unfortunate controversy between the mother and testator, which culminated in a separation and divorce; and he gave his property to Nick, who did not take sides against him or become estranged"); *Wallace*, 844 S.W.2d at 441 (upholding a will disinheriting children following a farm title litigation between the testator and her children in which it was established that the testator said the children would get nothing further from her and testator kept her promise).

Because William did not die intestate, whether or not Denise could establish that there was a factual dispute regarding her parentage is irrelevant to whether summary judgment was properly granted against Denise. Under the terms of the 2014 will, Denise is entitled to nothing.

Accordingly, we affirm the Jefferson Circuit Court's order which granted summary judgment to the Estate.

ALL CONCUR.

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